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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

CHARLES W. OHLE
and
RONALD J. JACKSON,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

1. Whether indictments under legislation concededly effective after the alleged commission of alleged violations charged and increasing former penalties therefor; changing the nature thereof from Misdemeanor to Felony, and depriving those charged, of a defense in connection therewith deprives those involved of constitutional safeguards against ex post facto punishment and due process protections.

2. Whether indictments under legislation concededly effective after the alleged commission of alleged violations charged and increasing former penalties therefor; changing the nature thereof from Misdemeanor to Felony, and depriving those charged, of a defense in connection therewith deprives those involved of constitutional safeguards against ex post facto punishment and due process protections, the more particularly when legislation of the forum expressly forbids such prosecution.

3. Whether indictments charging an offense which partially occurred before the effective date of the legislation creating same, and where state legislation expressly provides for prosecution therefor under prior legislation providing different and lesser penalties therefor deprives those charged of due process of law and protections against ex post facto punishment.

4. Whether in a disputed factual situation as to whether an element of an alleged offense occurred before or after the effective date of legislation under which the subjects were indicted, the court erred irreparably in not submitting the question to the jury under guiding instructions for its resolution as the finder of facts, the more particularly since ex post facto punishment and constitutional due process of law depended thereon.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of the parties to the proceeding in this Court.

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TABLE OF SUPPORTING AUTHORITIES

Cases:

Burello v. Commonwealth, State Emp. Retirement 411A 2d 852

Calder v. Bull, 3 U.S. (3 Dall.) 386

Chalin v. State, 1982 *Tex*, 6458 W 2d

Dobert v. Florida, 432 U.S. 282

Hayward v. U.S. Parole Commission, 502, F. Supp. 1007

Iowa v. Quanrude, 222 N.W. 2d, 467, 1974

Lindsey v. Washington, 301. U.S., 397, 1937

Massarella v. Elrod, 682 F. 2d 688

People v. Fox, 1984, 471 NYS 642

People v. Massarella, 1979, 400 NE 2d 436

State v. Bunn, 1968, 440 P 2d, 528

State v. Theodosopoulous, 461 A. 2d 100

State v. TPM, 1983, 460 A. 2d, 167

State v. Quanrude (Iowa) 222 N.W. 2d, 467

Thompson v. Utah, 1898 170 U.S. 343

U.S. v. Brown, 555 F. 2d 407

U.S. v. Pro Football, Inc., 514 F. 2d, 1396

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 9, Subsection 3 of the Constitution of the United States provides that "no bill of attainder or Ex Post Facto law shall be passed."

The 14th Amendment to the Constitution of the United States provides, among other things, that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny persons within its jurisdiction the equal protection of the law.

The Constitution of Pennsylvania, Article I, Section 17 provides that no "Ex Post Facto law or law impairing the obligations in contract" shall be passed, by the Pennsylvania General Assembly

STATUTORY PROVISIONS INVOLVED

The Crime Code of Pennsylvania 18 PS. 4701 defining the crimes of Bribery and Corrupt Influences and providing punishment therefor, available in Appendix H Page A 95.

The Penal Code of Pennsylvania 18 PS. Section 4303 defining Bribery of government officials and employees, judges, juries, etc. and providing punishment therefor reflected in Appendix H and available on Page A 96.

The Crime Code of Pennsylvania, 18 Pa. C.S. 3927 theft by failure to make required distribution of funds received, and the punishment therefor, available under Appendix E, Page A 61.

18 Pa. C.S. 903 charging conspiracy.

The Act of December 6, 1972, P.L. 1482, No. 334, effective June 6, 1983 and the second section thereof available under Appendix D, Page A 46.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner in his own right and on behalf of Co-Petitioner Ronald J. Jackson hereby Petitions for a Writ of Certiorari to review judgments of the Supreme Court of Pennsylvania more particularly set forth hereinafter and in support thereof avers the following:

OPINIONS BELOW

Chronologically arranged Opinions of the Court below are as follows:

a. Appendix F, Page A 76, Opinion and Order of the Court of Common Pleas of Dauphin County Pennsylvania of March 30, 1978

b. Appendix G, Page A 92, Supplemental Opinion of Dauphin County Court of Pennsylvania, Dated June 8, 1979

c. Appendix E, Page A 52, Opinion and Judgment of the Superior Court of Pennsylvania, Dated Sept. 25, 1981

d. Appendix D, Page A 31, Opinion and Judgment of the Supreme Court of Pennsylvania of Dec. 14, 1983.

e. Appendix C, Page A 26, Opinion and Judgment of the Superior Court of Pennsylvania of March 8, 1985

STATEMENT OF JURISDICTION

Petitioners seek review of the per curiam denial on the part of the Supreme Court of Pennsylvania of the petitioners application for allowance of appeal from the judgment entered on March 8, 1985 in the Superior Court of Pennsylvania, and more particularly from the judgment of the Supreme Court of Pennsylvania of December 14, 1983 reversing the action of the Superior Court of Pennsylvania in quashing indictments for Bribery and Conspiracy filed against the petitioners and the remanding of all other indictments against the petitioners to the Common Pleas Court of Dauphin County for a new trial and they invoke 28 USC Section 1254(1) as jurisdiction, for the Court to so do.
(See Appendixes A, Page A-1, and D, Page A-31 respectively)

STATEMENT OF THE CASE

During the year 1972 Reserve Insurance Co. of Chicago, IL a wholly owned subsidiary of American Reserve

Insurance Co. maintained a policy of insurance on approximately 28,000 motor vehicles of the Commonwealth of Pennsylvania and utilized the services of Market Facilities Insurance of New York also a wholly owned facility of American Reserve Insurance in discharging some of the responsibilities provided in the insurance coverage. The policy covered a three-year period and was renegotiated annually largely, but not exclusively for computing the annual overall charges to the Commonwealth for the services to be rendered in connection therewith, the said charges being determined measurably by the services which had been required in the previous year, or years.

In the year 1972 the local broker for said policy was apparently a supporter of one of the states major political parties. The other major party had come into statewide power and it was obviously time for a change in the brokerage allocation. The change was made more compelling by the frank profession of Frank C. Hilton, then Secretary of Property and Supplies for the Commonwealth that he was desirous of naming a broker who was a party member from whom they could make money. The achievement of this goal required time, and during approximately nine months of the fiscal year July 1972 to June 30, 1973, no broker was appointed, the duties of same being performed by Market Facilities Insurance Co. of New York, the aforementioned referred to subsidiary of American Reserve Insurance Co.

The said Secretary of Pennsylvania's Department of Property and Supplies turned over to Anthony J. Trucco, who headed the Bureau of Insurance in the said department, the recruiting of the proper organization to be the appointed broker. Trucco communicated with Noel T. Bernard, Resident Vice President of Market Facilities, Inc. of New York for guidance in procuring the proper broker. For some reason, which is not patently apparent

in the transcript testimony, both Market Facilities Insurance, Co. of New York and Reserve Insurance Co. of Chicago were also desirous of a change in brokers. Bernard recommended Charles W. Ohle, Inc. of New York city to be broker. In furtherance thereof Bernard arranged a meeting between Trucco, Ohle and himself at Stan's Restaurant in New York city in the early part of February, 1973. Bernard indicates that he left the table when the discussion came to the terms underwhich the brokerage appointment would be awarded to Charles W. Ohle, Inc. However, there is an abundance of testimony indicating his awareness of such terms. No mention of the interest of Secretary Hilton in this matter was made. Several days later Bernard was advised of the acceptance of Charles W. Ohle, Inc. of the terms which had been dictated to him as prerequisite to his being named broker for the aforementioned motor fleet policy.

The conditions for reveiving this brokerage were largely the following:

> The insuring company would pay Charles W. Ohle, Inc. a premium of 20% of the funds received from the state for coverage.
>
> The broker would pay thèrefrom to the Pennsylvania Higher Education Assistant Agency 7 percentum thereof.
>
> The broker would pay to Anthony J. Trucco 6 percentum thereof.

Charles W. Ohle, Inc. was not authorized to do business in Pennsylvania and to facilitate the foregoing Charles W. filed an application and procured authority to so operate in Pennsylvania on/or about during the month of March and was selected as broker in connection with the said policy during the month of April, 1973.

Apparently no insurmountable problems occurred in the first two years of the policy. However, in the third

year, to wit from July 1st, 1974 to June 30, 1975 problems did arise. Arrangements had been made which were agreeable to all concerned, that payment checks by the State for the services bargained for would be made to Market Facilities Insurance Co. New York and Charles W. Ohle, Inc. jointly and that Market Facilities, Inc. of New York would either endorse said check over to Charles W. Ohle, Inc. or that Charles W. Ohle acting individually would endorse said checks over to Charles W. Ohle, Inc. on behalf of said Market Facilities and that Charles W. Ohle, Inc. after depositing said checks in their own account would deduct its 20% premium therefrom and forward the balance to the insurer, the said Reserve Insurance Co. of Chicago. Payment was made accordingly until and inclusive of the first instlallment due for the fiscal year July 1, 1984 to June 30, 1985. (See T.T., Page 89, Line 29.) The second payment to the insurer was not made nor was any subsequent payment made thereafter, and the insurer notified the State of its intention to cancel the policy as of Jan. 27, 1985.

During the interim, the State had paid its obligations for the annual year as aforesaid by delivering checks to a representative of Charles W. Ohle, Inc. in Pennsylvania, on July 25, Aug. 5, and Sept. 26, 1974 in the respective sums of $500,000, $300,000 and $215,000 payable to Market Facilities Insurance Co. and Charles W. Ohle, Inc.

After inquiry by the insurer to Petitioner Ronald J. Jackson as to when payments would be made of the second installment a check was issued by Charles W. Ohle, Inc. to the insurer which was returned for insufficient funds. No further payments were made to the insurer by the Petitioners.

The matter appears to have become the subject of public inquiry through the leakage to a local newspaper of information by a disgruntled employee of the Ohle company reflecting knowledge on his part of a kick back scheme between the Secretary of Property and Supplies

and the Ohle company. Investigation followed by both Federal and State authorities and as a consequence thereof Petitioners were indicted by the Grand Jury of Dauphin County's Criminal Division, for Bribery and Corrupt influence, Conspiracy, and obtaining property upon agreement or subject to a known legal obligation to make specified payments or other disposition and of intentionally dealing with property as their own and of failing to make the required payments or disposition on June 11, 1975. Prior to trial preliminary motions were filed raising questions herein involved and again subsequent thereto motions for new trial and in arrest of judgment, all of which were denied by the Court.

The first trial of Petitioners began on June 1, 1977; in the Common Pleas of Dauphin County, Pennsylvania on the charge of obtaining property upon agreement and subject to a known legal obligation to make specifed payments or other disposition and that Petitioners did intentionally deal with said property as Petitioners own and failing to make the required payment or disposition. It resulted in a conviction of Petitioners.

A second trial on charges of Bribery and Conspiracy began on Nov. 15, 1977 in the same court and was recessed on/or about Nov. 17, 1977 because of the illness of Petitioner, Ronald J. Jackson and was recommenced on/or about Dec. 13, 1977 against Charles W. Ohle alone. It also resulted in a conviction of Charles W. Ohle. The said charges against Ronald J. Jackson have not been reactivated. On April 21, 1978 Petitioners herein were sentenced in the Dauphin County Court House in Harrisburg, Pennsylvania. (See Appendix O., Page 123 as follows)

On the charge of receiving property under agreement etc. and using it as his own and not disposing of it properly, Petitioner Ohle was fined, $1,000, cost of prosecution, and confinement in a State correctional institution for not less than three years and no more than seven years, together with restitution to the Commonwealth in

the amount of $304,500. In connection with the charge of Conspiracy, Petitioner Ohle was sentenced to pay a fine of $500, the cost of prosecution, and confinement in a State correctional institution of not less than one year and no more than two years and to begin after the expiration of the sentence imposed on the aforementioned misuse of funds charge. On the Bribery charge, Petitioner Ohle was sentenced to pay a fine of $500, the cost of prosecution and confinement in a State correctional institution for a term of not less than six months and no more than one year, the sentence to run concurrent with that imposed in the Conspiracy charge.

The Defendant Ronald J. Jackson was sentenced on the failure to make required distribution of funds received in connection with a known agreement, to pay a fine of $1,000 cost of prosecution and confinement in a State correctional institution of not less than three years and no more than seven years. In addition said Petitioner, Ronald J. Jackson was ordered to make restitution to the Commonwealth of Pennsylvania in the amount of $304,500.00.

An Appeal was processed by Petitioners from the foregoing to the Superior Court of the Commonwealth of Pennsylvania and on Sept. 25, 1981 its Opinion and Order was filed quashing the indictments in the Bribery and Conspiracy charges and remanding the charges on the misuse of funds indictments for a new trial.

The Commonwealth of Pennsylvania Appealed from the decision of the Superior Court of Pennsylvania to the Supreme Court of Pennsylvania and/or about Dec. 14, 1983 that Court filed its Opinion and Order which reinstated the judgment of the Dauphin County, Pennsylvania Common Pleas Court while remanding certain undisposed aspects of the situation to the Superior Court of the Commonwealth of Pennsylvania for their disposition.

In compliance with directions of the Supreme Court of Pennsylvania, the Superior Court of Pennsylvania, on

March 8, 1985 issued a Memorandum Opinion and Order which reinstated the judgment of the Dauphin County Common Pleas Court of Pennsylvania.

On April 8, 1985 Petitioners filed and Application for Allowance of an Appeal from said judgement of the Superior Court of Pennsylvania and by per curiam action the Supreme Court of Pennsylvania on Aug. 27, 1983 the application was denied.

Application was mades by Petitioners for and Extension of Time for the Filing of a Petition for Writ of Certiorari and on the 17th day of October 1985, the Honorable William J. Brennan, Jr. Associate Justice of this Honorable Court issued an Order "extending time to and including Nov. 25, 1985" for filing a petition for Writ of Certiorari which order bears the Processing No. A 302.

The constitutional concerns of the Petitioners, who are first offenders, were raised early in the proceedings, to wit in Pre Trial proceedings in the Forum Court. Reference thereto, Appendix F, Page A 79 and No. 5 of Page A 80. The Forum Court was again advised of Petitioners constitutional concerns in rejecting Petitioners post trial applications for a new trial and in arrest of judgement of June 13 and December 22, 1977 respectively. See Appendix M and N. respectively Pages A. 112 and A 116 with particular reference to Page 113 Paragraph 13 and Page 118 Paragraph 16. The matter was raised anew in the Superior Court of Pennsylvania reference thereon being made in Appendix E. Page A. 57 and was also renewed in the Supreme Court of Pennsylvania, Appendix D., Page A 36.

In the Bribery and Conspiracy cases 18 Pa S 4701 and 18 PA S 903 the Trial Court concedes that the offenses involved occurred before June 6, 1973 effective date of the Crime Code but down graded the failure to indict under the former Penal Code indicating that the language of both acts were very similar and the charging language of the indictments would apply to the Penal Code as well. See Appendix I and J Pages 98 and 102

respectively. It was further stated that "The Commonwealth cannot be thwarted in its duties as a prosecutor because of an abstract supposition". See Appendix F, Page 89.

The Superior Court of Pennsylvania quashed the indictments for Bribery and Conspiracy see Appendix E. Page A 57 and 58. The Supreme Court of Pennsylvania conceded that Petitioners should have been indicted for Bribery and Conspiracy under the Penal Code. Appendix D. Page 45 but indicated that no harm would be done to the Petitioners if their criminality was determined under the Penal Code and apparently finding that the Petitioners would have been found guilty under both codes irrespectively of the fact that the Crime Codes changed the status of the offense from a misdemeanor to a Felony eliminated a defense, provided in the Penal Code, etc.

As to the charge generally referred to as theft by failure to account. The Trial Court conceded that acts took place which established an agreement and obligation of accounting between the Commonwealth, the insuring company and the Petitioners before the effective date of the Crime Code to wit: June 6, 1983, but held that no crime could be committed irrespective of a pre existing agreement and responsibility until the taking of the property occurred. See Appendix F. Page A 88. The Superior Court and the Supreme Court of Pennsylvania reached the same conclusions.

The Petitioners herein seek a Writ of Certiorari for reviewing the per curiam action of the Supreme Court, in denying application for Allowance of Appeal from judgement of March 8, 1985 in the Superior Court of Pennsylvania as well as the judgement of December 14, 1983 of the Supreme Court of Pennsylvania vacating an order of the Superior Court of Pennsylvania of September 25, 1981 quashing indictments against Petitioners for Bribery and Conspiracy and remanding indictment charges of Theft by failure to account to the Dauphin County Court of Common Pleas for a new trial.

WHY THE JURISDICTION OF THIS COURT IS INVOKED

Pursuant to the command of Rule 21 of this Honorable Court, applicable to reviews of judgments of a State Court we have set forth in the Statement of the Case considerable information as to the timing and methods used to focus the attention of the courts below on the issues to which this court's attention is now invoked. We now review the foregoing only to direct the court's attention to their constitutional aspects.

In summary the Petitioners were indicted by a Grand Jury of the Common Pleas Court of Dauphin County Pennsylvania on three charges, Bribery, Conspiracy and a purely statutory crime listed by said Dauphin County Court in brief as Theft by Failure to Make Required Disposition of Funds Received. Statutorially they involve 18 PA. S. 4701, 18 Pa. S. 903 an 18 Pa. S. 3927 respectively. A Printer's Rendition of a Certified Copy of each indictment will be found in Appendix H, I and J, Pages A 95 and A 98 and A 102.

There is no denial by anyone that the alleged conduct on the part of your Petitioners which resulted in the indictments for Bribery and Conspiracy occurred prior to June 6, 1973 the effective date of the legislation creating the crimes under which your Petitioners were indicted, nor is there any denial of the fact that in enacting said legislation provision was made by the General Assembly of Pennsylvania for the prosecution of crimes thereunder by previous existing legislative provisions where an element of the offense occurred prior to the effective date of said legislation. (See 18 Pa. Section 102, Act of Dec. 6, 1972, P. L., 1482 effective June 6, 1973 set forth herein inter alia in the Opinion of the Superior Court of Pennsylvania of Sept. 25, 1981, Appendix E., A 57. Nor is there any apparent denial that the occurrences, conduct and behavior on the part of Petitioners and others which created the known legal obligation and agreement to

make specified payments or other distribution of property involved in the indictments occurred before the effective date of the legislation under which the Petitioners were indicted. (See Appendix K, Page A 105.)

Why then do Petitioners seek Certiorari?

It is because the Courts below either ignore or treat with disdain, as trivia fundamental protections against ex post facto punishment, and the enjoyment of due process or apologize for the situation conceding that there was error in indicting your Petitioners under the wrong law, but indicating that there is no harm done since their conduct would have been equally punishable under both laws and that in punishment the entire situation will be treated in balance, irrespective of the fact that the law under which Petitioners were indicated increases punishment, changes the nature of the offense from a misdemeanor to a felony and deprives the Petitioners of a prior defense.

In connection with the trial court's commitment to keep the total picture in view at time of sentencing it may be observed that although all the Opinions referring to punishment indicate that the sentences were to run concurrently the actual sentences imposed, Appendix O, Page 123, reflects what the Petitioners heard as they were being sentenced, to wit, the sentences for the crimes of Bribery and Conspiracy, though running concurrent with each other, were to commence after the expiration of the sentence for Theft by Failure to Dispose of Property in Accordance with Agreement. Nor is there found in a sentence of 3 to 7 years any particular leniency.

As to the crime of Theft by Failure to Dispose of Property as per Agreement, Pa. S 3927 an attempt appears to be made to paper over the situation by conceding that conduct creating fiduciary relationship, which was allegedly violated, occurred before the property was acquired. No determination by the jury to this effect was made, and Petitioners believe that this court will decide

that an indispensable element of the crime occurred before the effective date of supplanting legislation. Petitions will explore this conclusion thoroughly in their Brief.

Petitioners are mindful of the interdiction of this court against arguments in this Petition and merely point out that supporting authority indicated in Table of Cases attached hereto refute practically all of the major positions of the trial court and the Supreme Court of Pennsylvania, (though not the Superior Court of Pennsylvania) have taken in the matter.

CONCLUSIONS

Protections against ex post facto punishment and the achieving of due process for the citizenry of this country were won at the price of blood, sweat, toil and tears, and are not to be sneered at as an abstract supposition, denegrated, ignored or denied.

WHEREFORE we seek the protection provided by Section 28, U.S.C., Section 1254, Paragraph 1.

Respectively submitted

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Charles W. Ohle, Petitioner